Supreme Court, U.S.
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No. 02-1131

In the Supreme Court of the United States

MARTIAL-BERTRAND NKOUNKOU, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under *INS* v. *Ventura*, 123 S. Ct. 353 (2002) (per curiam), the court of appeals erred when it denied a petition for review of a decision of the Board of Immigration Appeals, rather than granting the petition and remanding the case to the agency.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Akinmade v. *INS*, 196 F.3d 951 (9th Cir. 1999)	7, 10-11
Dass, In re, 20 I. & N. Dec. 120 (BIA 1989)	3
Elnager v. *INS*, 930 F.2d 784 (9th Cir. 1991)	3-4
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	4
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	4
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992)	9
INS v. *Stevic*, 467 U.S. 407 (1984)	4
INS v. *Ventura*, 123 S. Ct. 353 (2002)	8, 9, 10

Statutes and regulations:

Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2135 (6 U.S.C. 271(b))	2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1101(a)(42)(A)	2
8 U.S.C. 1158	5
8 U.S.C. 1158(b)(1)	2
8 U.S.C. 1158(b)(2)	2
8 U.S.C. 1158(b)(2)(C)	2-3
8 U.S.C. 1158(d)(1)	3
8 U.S.C. 1158(d)(5)(B)	3
8 U.S.C. 1158(2)(D)	2
8 U.S.C. 1182(a)(7)(A)(i)(I)	5
8 U.S.C. 1231(b)(3)	5
8 U.S.C. 1231(b)(3)(A)	4
8 U.S.C. 1231(b)(3)(B)	4

Statutes and regulations—Continued: Page

8 U.S.C. 1252 5
8 U.S.C. 1252(a)(4)(D) 2
8 U.S.C. 1252(b)(2) 4
8 U.S.C. 1252(b)(4) 4
8 U.S.C. 1252(b)(4)(A) 4
8 U.S.C. 1252(b)(4)(B) 4, 9
8 C.F.R.:
Pt. 3:
Section 3.1 (2002) 4
Pt. 208:
Sections 208.2 to 208.5 3
Section 208.13(a) 3
Section 208.13(b) 3
Section 208.13(b)(1) 3
Section 208.13(b)(2)(i)(B) 3
Section 208.13(c) 3
Section 208.16(b) 5
Section 208.16(c) 5
Pt. 1001:
Section 1001 *et seq.* (Ch. V) 2

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter*, but is reprinted at 35 Fed. Appx. 680.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2002. A petition for rehearing was denied on October 30, 2002 (Pet. App. 44a; see Pet. 1). The petition for a writ of certiorari was filed on January 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct such as participating in persecution or committing a particularly serious crime. 8 U.S.C. 1158(b)(1) and (2). The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. 1158(b)(1) and (2)(D), 1252(a)(4)(D).*

Congress has authorized the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. 1158(b)(1); see 8 U.S.C.

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* On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the initial adjudication of asylum and refugee applications, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (codified at 6 U.S.C. 271(b)). The Attorney General, however, remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals (BIA). See 8 C.F.R. 1001 *et seq.* (Ch. V) (2003) (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization, the INS was named as the respondent in this case. The correct respondent was, and is, the Attorney General of the United States. See 8 U.S.C. 1252(b)(3)(A).

1158(b)(2)(C), (d)(1) and (d)(5)(B). Regulations issued pursuant to the Attorney General's authority place on the asylum applicant the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). The regulations provide that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Ibid.*; see *In re Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989) ("[A]n alien's own testimony * * * can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear.").

An asylum applicant who establishes that he suffered past persecution on account of a statutorily protected characteristic is rebuttably presumed to have a well-founded fear of future persecution if returned to his home country. 8 C.F.R. 208.13(b)(1). An applicant who has not established past persecution nevertheless can qualify as a refugee and be eligible for asylum if he otherwise proves, *inter alia*, that "[t]here is a reasonable possibility of suffering such persecution if [the applicant] were to return to [his home] country." 8 C.F.R. 208.13(b)(2)(i)(B).

When an alien is charged with being removable from the United States, the alien may have his asylum claim resolved in those proceedings. See generally 8 C.F.R. 208.2 through 208.5. Such a claim, and other issues relevant to whether the alien ultimately will be removed from the United States, are decided by an immigration judge (IJ) after a hearing. See 8 C.F.R. 208.13(b) and (c). The asylum decisions of IJs are appealable to the BIA, which, under the rules that applied to petitioner's case, had the power to conduct a *de novo* review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir.

1991); see also 8 C.F.R. 3.1 (2002). A finding by the BIA that an asylum applicant failed to carry his burden of proof is reviewable, on judicial review of the final order of removal entered against the alien, by the federal court of appeals for the circuit in which the IJ sat. 8 U.S.C. 1252(b)(2).

Judicial review of BIA decisions, including those addressing asylum issues, is limited by statute. See 8 U.S.C. 1252(b)(4). Most important here, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based," 8 U.S.C. 1252(b)(4)(A), and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B).

b. The INA also provides for a related form of relief from removal, known as "withholding of removal." If the Attorney General determines that the "alien's life or freedom would be threatened" in the country to which the alien would be removed "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for this form of relief. 8 U.S.C. 1231(b)(3)(A). Unlike asylum, withholding of removal is mandatory rather than discretionary in nature. To be entitled to this relief from removal, however, the alien must not fall within one of the specified categories of criminal and other dangerous aliens. See 8 U.S.C. 1231(b)(3)(B) (excepted aliens). The alien must demonstrate a "clear probability of persecution" in order to receive withholding of removal. *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); see generally *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing relationship between asylum and withholding of removal); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999) (same). As with an applicant

for asylum, the applicant for withholding of removal bears the burden of proving his eligibility for relief, and the applicant's testimony may alone suffice to establish eligibility if it is credible. See 8 C.F.R. 208.16(b). BIA decisions on applications for withholding of removal are subject to judicial review under the same rules as BIA decisions on asylum applications. See 8 U.S.C. 1252.

2. Petitioner is a native and citizen of the Republic of Congo. Pet. App. 10a. On October 30, 1999, petitioner arrived in Anchorage, Alaska, on an airline flight from Hong Kong, without valid documents for entering the United States. The INS charged petitioner with being inadmissible to the United States under 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 5a, 10a, 30a.

In administrative proceedings to remove petitioner from the United States, petitioner applied for asylum under 8 U.S.C. 1158 and withholding of removal to the Congo under 8 U.S.C. 1231(b)(3), and also sought withholding of removal under the Convention Against Torture, see 8 C.F.R. 208.16(c). Pet. App. 5a-6a. Petitioner did not claim that he had suffered persecution in the past. Instead, he alleged that he has a well-founded fear of future persecution in the Congo based upon his political opinion and his membership in the Lari tribe. *Id.* at 34a.

At a hearing before an IJ, petitioner testified that he was a political supporter and associate of former Congolese President Lissouba. In 1997, a military force known as the Cobras, led by a man named Sassou-Nguesso, deposed Lissouba, and Sassou-Nguesso became the President of the Republic of Congo. Pet. App. 19a-20a. Petitioner testified that after serving as a hotel manager in Brazzaville for several months after Lissouba's deposal, he fled from the Cobras and lived in rural villages. *Id.* at 20a-21a, 26a-27a. Petitioner

claimed that he later returned to the Brazzaville area under the protection of a certain colonel in the Cobras, whose name petitioner supposedly swore not to reveal. *Id.* at 22a. Petitioner testified that stamps in his passport showing crossings of the border with Zaire in 1997 and 1998—at a time when that border was controlled by the Cobras—were for trips that he took with and at the behest of "the Colonel." *Id.* at 23a, 24a, 27a, 36a-37a.

Petitioner testified that in 1998, he left Brazzaville for Hong Kong. Pet. App. 25a. He left his wife and daughter in the Congo. *Id.* at 30a. In October 1999, petitioner left Hong Kong for the United States. *Ibid.* Petitioner said that he paid for his airline ticket to the United States by drawing funds against a Diner's Club credit card account that he had managed when he worked as a hotel manager in Brazzaville. *Id.* at 30a-31a, 33a. Petitioner testified that the Colonel is now dead and that he would be tortured and killed by the Cobras if he returned to the Congo. *Id.* at 22a, 25a-26a.

3. An IJ denied petitioner's applications for asylum and withholding of removal and ordered him removed to the Republic of Congo. Pet. App. 43a. The IJ determined that petitioner did not provide credible testimony establishing a reasonable fear of persecution (*id.* at 34a-35a) because: (1) petitioner lived in the Cobra-controlled Brazzaville area for more than a year during 1997 and 1998 and was not harmed, see *id.* at 35a-36a; (2) petitioner made frequent trips to Zaire during that time, which he never adequately explained, see *id.* at 36a; (3) petitioner was not harmed during his border crossings, although the Cobras controlled the border, see *id.* at 37a; (4) petitioner refused to give the real name of "the Colonel," "despite the Colonel's overwhelming importance to [petitioner's] claim and the

fact that he is no longer living," *id.* at 38a; and (5) petitioner's story about obtaining money from Diner's Club was not credible and, if true, created a contradiction in petitioner's testimony because petitioner said that he did not bring his family to Hong Kong because he lacked money, *id.* at 38a-39a. The IJ determined that the discrepancies in petitioner's testimony were "substantial and bear a legitimate nexus to the finding that respondent does not have a credible fear of persecution in the Congo." *Id.* at 40a. In addition, the IJ stated that "[e]ven if [petitioner] were found to be credible, he has shown no incidents of past persecution nor has he shown any likelihood of future persecution on account of his claimed support of Lissouba or because he is a Lari." *Ibid.*; see *id.* at 42a.

4. The BIA dismissed petitioner's appeal. Pet. App. 5a-8a. It determined that the IJ "properly evaluated the facts presented by [petitioner] in support of his asylum claim and correctly concluded that he failed to establish either past persecution or a well-founded fear of persecution in the Republic of Congo on account of a ground enumerated in the [INA]." *Id.* at 6a; see *id.* at 7a-8a. In particular, the BIA determined that the IJ "had ample reasons to support her adverse credibility determination," including "the numerous inconsistencies in [petitioner's] testimony, the lack of evidence and absence of detail to support his account of events, and the inherent improbability of various elements of his claim." *Id.* at 6a-7a.

5. The Court of Appeals for the Ninth Circuit denied petitioner's ensuing petition for review. Pet. App. 1a-4a. The court stated that "[d]isregarding how [petitioner] bought his airplane ticket to this country and why he stayed for a year in Hong Kong, see *Akinmade* v. *INS*, 196 F.3d 951, 956 (9th Cir. 1999), the BIA's

ruling that [petitioner] did not demonstrate past persecution or a well-founded fear of persecution is nevertheless supported by substantial evidence." Pet. App. 1a-2a. The court specifically noted that petitioner "lived safely in the outskirts of Brazzaville during the height of civil unrest and was able to travel in and out of the country." *Id.* at 2a. The court continued that "[a]lthough [petitioner] submits that this was because he was under a Colonel's protection, the BIA was not compelled to accept his explanation as it was wholly unsubstantiated." *Ibid.* The court then listed several other portions of the record that contradicted petitioner's claim that he was threatened with persecution in the Republic of Congo. *Ibid.*

Judge McKeown dissented. In her view, the IJ's denial of petitioner's application for asylum was "predicated on an adverse credibility finding that cannot be sustained by the administrative record." Pet. App. 2a. Judge McKeown further expressed the view that materials in the administrative record, including country-conditions reports by the Department of State and Amnesty International, demonstrated that members of the Lari tribe and supporters of President Lissouba "were singled out by the ruling militia for persecution and thus faced dangers more severe than those faced by other Congo citizens." *Id.* at 3a.

ARGUMENT

The unpublished decision of the court of appeals in this case is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is not warranted.

1. a. Petitioner contends that the case should be remanded to the court of appeals for further consideration in light of *INS* v. *Ventura*, 123 S. Ct. 353 (2002) (per

curiam). See Pet. 4, 7. In *Ventura*, the Court held that the Ninth Circuit exceeded the permissible scope of its review when, having overturned a determination by the BIA that an alien had not established past persecution on account of a protected characteristic, the court itself determined the alien's eligibility for asylum and withholding of deportation, rather than remanding the case to the BIA for it to address those issues in the first instance. The Court stated that when a reviewing court sets aside an administrative decision, it generally "should remand [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands." 123 S. Ct. at 355. The Court stressed that in a remand proceeding the BIA could "bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in so doing, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 355-356. Thus, the Court concluded, the Ninth Circuit "seriously disregarded the agency's legally-mandated role" when it made an initial determination about the alien's eligibility for relief, "without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *Id.* at 356.

Ventura also reaffirmed the rule that a reviewing court may not overturn the BIA's factual determinations merely because the evidence is "ambiguous" and might support a conclusion different from the agency's. *Ventura*, 123 S. Ct. at 356. Rather, the BIA's determination must be upheld if a reasonable fact-finder would not be *compelled* to disagree. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992); 8 U.S.C. 1252(b)(4)(B).

b. Petitioner's reliance on *Ventura* is entirely misplaced. This is not a case in which the court of appeals decided a question "without giving the BIA the opportunity to address the matter in the first instance." *Ventura*, 123 S. Ct. at 356. Rather, this case involves a routine, fact-bound application of the statutory rule that the BIA's "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

Here, the IJ, affirmed by the BIA, determined "that respondent is not credible and that he has failed to show facts that would support a reasonable fear of persecution." Pet. App. 34a-35a; see *id.* at 6a. The BIA determined that the IJ "properly evaluated the facts presented by the [petitioner]." *Id.* at 6a. The court of appeals cited the same set of facts about petitioner's experiences in the Congo that the IJ found significant, compare *id.* at 2a (court of appeals) with *id.* at 35a-38a, 40a-41a (IJ), and concluded that "the BIA's ruling that [petitioner] did not demonstrate past persecution or a well-founded fear of persecution is * * * supported by substantial evidence." *Id.* at 2a. The court of appeals therefore denied the petition for review of the BIA's decision because the record supported the determinations of the IJ and BIA. Unlike *Ventura*, this is not a case in which the court made a determination in the first instance about an issue the agency had not yet addressed.

2. The court of appeals did indicate that it disagreed with the IJ's determination that inconsistencies in petitioner's testimony about his Diner's Club transaction and his reasons for staying in Hong Kong for a year were materially related to his claims of persecution in the Congo. Pet. App. 1a-2a (citing *Akinmade* v. *INS*,

196 F.3d 951 (9th Cir. 1999)); see *id.* at 40a. But the court of appeals sustained the BIA's ultimate conclusion that petitioner failed to provide credible testimony establishing his eligibility for relief. In doing so, the court of appeals specifically upheld the BIA's refusal to credit petitioner's "wholly unsubstantiated" testimony about the Colonel and material events in the Congo. Pet. App. 2a.

Thus, even though the court of appeals did not approve the BIA's inferences from petitioner's testimony about his activities in Hong Kong, the court upheld the BIA's adverse credibility determination because it was supported by the record evidence. See Pet. App. 6a-7a (noting "numerous inconsistencies in the respondent's testimony, the lack of evidence and absence of detail to support his account of events, and the inherent improbability of various elements of his claim"). Accordingly, petitioner is mistaken when he asserts (Pet. 5) that the court of appeals affirmed the BIA's judgment "on an alternative theory not addressed by the BIA."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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